The Asset Tracing and Recovery Review

Third Edition

Editor
Robert Hunter

Law Business Research

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This article was first published in The Asset Tracing and Recovery Review - Edition 3
(published in September 2015 – editor Robert Hunter)

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-69-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAN VINGE KB

ALLEN & OVERY LLP

ALLENS

ARENDT & MEDERNACH

BAKER & McKENZIE LLP

BAKER & PARTNERS

BATLINER GASSER RECHTSANWÄLTE

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EDITOR'S PREFACE

'Fraud' is a word that people find easier to use than to define. Partly for this reason, it is difficult for lawyers to summarise the way in which their particular jurisdictions deal with it. Some of the sources of their laws will be domestic and will have evolved over time. Others will be recent international conventions where regard must be had to the decisions of other jurisdictions.

But these difficulties aside, the problems that 'fraud' generates pose unique challenges for the legal system of any country. First, there will be forensic issues: to what lengths should the court go to discover what actually happened? Here different jurisdictions place different priorities on what their courts are for. Some treat the court process as an almost sacrosanct search for truth. The courts of my own jurisdiction tend towards this end of the spectrum. Others regard it as a means of resolving disputes efficiently and providing certainty for the litigants. Often courts in this category allow no witness evidence and no procedure for disclosure of documents, regarding both as disproportionately burdensome for any benefit they might provide.

Second, there is the question of whether the court should mark conduct that is 'fraudulent' as particularly abhorrent, in civil proceedings. All will criminalise fraudulent behaviour, but not all will penalise fraudulent conduct by enhancing the victim's compensation or by depriving the fraudster of arguments that might have been available to them if they had been careless, rather than dishonest.

Third, there is the question of innocent parties: to what extent should victims of fraud be given enhanced rights over 'victims' of ordinary commercial default? In some jurisdictions it is said that victims of fraud part with their assets – at least to some extent – involuntarily while commercial counterparties take risks with their eyes open. Hence, victims of fraud can, in some circumstances, be allowed to retrieve assets from an insolvency before ordinary trade counterparties or 'general creditors' do so.

Lawyers have been mulling over the rights and wrongs of solutions to the problems that fraud presents for centuries. They will never stop doing so. The internationalisation of fraud in the past 40 years or so, however, has meant that they argue about these problems not only with lawyers of their own country, but also with lawyers from other jurisdictions.

Rarely nowadays will a fraudster leave the proceeds of fraud in the jurisdiction in which they were stolen. The 1980s and early 1990s saw quite pronounced attempts by fraudsters to 'arbitrage' the various attitudes and priorities of different jurisdictions to retain what they had taken. Perhaps the highest-profile example of this was the use of jurisdictions in which banking secrecy was a priority as a conduit to which the proceeds of fraud would be transmitted. Another well-known strategy was the use of corporate devices and trusts as a means of sheltering assets from those who deserved to retrieve them.

A number of factors have served to make this more difficult. The growth of international conventions for the harmonisation of laws and enforcement of judgments is clearly one. Perhaps more notable, however, has been the international impetus to curb money laundering through criminal sanctions. These have, however, been first steps, albeit comparatively successful ones. There is still a huge amount to be done.

I have specialised in fraud litigation – virtually exclusively – since the late 1980s. My chosen area has brought me into contact with talented lawyers all over the world. I remain as fascinated as I was at the outset by the different solutions that different countries have to the problems fraud creates. I am sometimes jealous and sometimes frustrated when I hear of the remedies for fraud that other jurisdictions offer or lack. When I talk to lawyers who enquire about my own jurisdiction, I frequently see them experiencing the same reactions too. The comparison is more than a matter of mere academic interest. Every month brings some study by the government or private sector tolling the cost of fraud to the taxpayer or to society in general. My own interest goes beyond ordinary 'balance sheet' issues. When I deal with fraudsters, particularly habitual or predatory ones, I still retain the same appalled fascination that I experienced when I encountered my first fraudster and I share none of the sneaking admiration for them that I sometimes see in the media; they are selfish, cruel and immature people who not only steal from their victims, but also humiliate them.

No book sufficiently brief to be useful could ever contain all the laws of any one jurisdiction relating to fraud. The challenge, unfortunately, for a contributor to a book like this lies as much in what to exclude as what to say. This guide contains contributions from eminent practitioners the world over, who have, on the basis of their experience, set out what they regard as critical within their own jurisdictions. Each chapter is similarly structured for ease of reference with similar headings to enable the reader to compare remedies with those in other jurisdictions, and each contributor has been subject to a strict word limit. Despite there being a huge amount more that each would have been perfectly justified in including, I still believe this book to be an enormous achievement.

Once again, we have some of the foremost experts in the area from an impressive array of jurisdictions contributing. I have often thought that true expertise was not in explaining a mass of details but in summarising them in a meaningful and useful way. That is exactly the skill that a work like this requires and I believe that this edition will continue the high standard of the previous two. I have come across a number of the authors in practice and they are unquestionably the leaders in their fields. I hope that other readers will find the work as useful and impressive as I do.

Robert Hunter
Herbert Smith Freehills LLP
London
September 2015

Chapter 30

UNITED STATES

Steven K Davidson, Michael J Baratz, Jeffrey M Theodore and Jared R Butcher[1]

I OVERVIEW

The United States – and New York in particular – is a major financial centre, generating substantial investment capital. Many of the world's largest banks, law firms and accounting firms maintain offices in New York and elsewhere in the United States. As a result, a host of international business and financial transactions touch the United States and fall within the jurisdiction of its courts.

The focus of this chapter is on fraud, but most of the transactions conducted in the United States are not fraudulent. Financial transactions – and the banks and others who facilitate them – are highly regulated by United States law and offer a reasonable level of transparency to the participants. There are few barriers to transparency such as banking secrecy laws. Nevertheless, the sheer volume of transactions and the ready availability of funding create opportunities to defraud investors and third parties. In these cases, law enforcement authorities and courts are willing to assist victims.

Fraudulent conduct often violates United States laws and leads law enforcement authorities to launch investigations and assist recovery efforts. In particular, United States capital markets are highly regulated to prevent fraud and ensure the safety of investors. Victims, including those abroad, also may be able to bring civil lawsuits if the fraudulent conduct has a sufficient connection to the United States or its citizens.

The United States is a common law jurisdiction with a dual court system. Federal courts have a limited jurisdiction authorised by the Constitution and federal statute. Each of the 50 states, plus the national capital, the District of Columbia, also has its own courts of general jurisdiction. Both state and federal courts offer an independent and skilled judiciary, broad discovery and significant mechanisms for enforcing judgments.

1 Steven K Davidson and Michael J Baratz are partners, Jeffrey M Theodore is of counsel, and Jared R Butcher is an associate attorney at Steptoe & Johnson LLP.

The common law governing fraud is generally a matter of state law, although it has been incorporated into many federal fraud statutes. Fraud claims are generally heard in state courts unless a federal law applies or the plaintiff can invoke federal court jurisdiction based on the 'diverse' residence of the parties.

United States courts will also assist foreign courts and arbitral tribunals if victims of fraud choose to pursue their claims elsewhere. Claimants in foreign cases will often obtain US discovery and provisional remedies that secure US assets pending the outcome of the foreign proceeding. Once a foreign judgment or arbitral award is rendered, United States courts rarely refuse to enforce it. Thus, victims of fraud – whether proceeding in the United States or another jurisdiction – should avail themselves of the remedies offered by the US legal system.

II LEGAL RIGHTS AND REMEDIES

i Civil and criminal remedies

Criminal remedies

The United States has myriad criminal laws against fraud. Law enforcement may investigate and bring civil or criminal actions against the perpetrators. Certain frauds involving areas such as securities, antitrust, banking or organised crime are subject to the jurisdiction of a specialised government agency.

A possible government investigation, however, may not result in a satisfying or timely resolution for fraud victims. Victims of the fraud, therefore, should consider whether they have the resources to conduct their own investigation. Especially where a victim cannot effectively pursue a claim, it may be worth asking law enforcement to investigate. Many fraud investigations are commenced as the result of complaints by private citizens or independent investigators. Under appropriate circumstances, the opportunity exists for victims to leverage the considerable powers of the government to investigate wrongdoing and hold the perpetrators accountable.

Civil remedies

Racketeer Influenced and Corrupt Organizations Act

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides criminal and civil remedies for victims of organised crime and other criminal schemes.[2] RICO claims must meet stringent technical requirements beyond the scope of this chapter. Assuming those requirements are met, however, RICO offers victims a chance to recover treble damages through private lawsuits.

Under RICO, defendants who engage in a pattern of racketeering activity or collection of unlawful debts and who participate in an 'enterprise' that affects interstate or foreign commerce can be held liable to those who suffer damage to their business or property. Racketeering activity includes a variety of violations of state and federal laws.

2 See 8 USC Sections 1961–1968.

An 'enterprise' includes any individual, partnership, corporation, association, or other legal entity and any group of individuals associated in fact although not a legal entity.[3]

To be liable, defendants must have one of four specific relationships to the enterprise: (1) investing the proceeds of the pattern of racketeering activity into the enterprise; (2) having an interest in, or control over, the enterprise through the pattern of racketeering activity; (3) participating in the affairs of the enterprise through the pattern of racketeering activity; or (4) conspiring to accomplish one of the first three activities.[4]

Courts have held that RICO does not apply to conduct outside the United States.[5] There is no bright-line test for determining whether a RICO claim is impermissibly extraterritorial, but courts will look for facts such as whether the claim involves US companies or individuals and whether it involves conduct in the United States or directed at the United States. For example, the Second Circuit Court of Appeals has held that 'RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate', meaning that when a RICO claim depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially, RICO will also apply to extraterritorial conduct.[6]

Fiduciary duty claims

US law often imposes fiduciary duties on those – such as corporate directors, trustees, administrators and executors – who occupy a position of trust because of their power over the financial interests of another. Conduct violating that trust may form the basis of a claim for breach of fiduciary duty. However, fiduciary duties are not ordinarily imposed in typical business disputes and parties to these disputes generally are not obligated to act in each other's best interests. There must be special circumstances establishing a fiduciary relationship between the perpetrator and the victim.

A typical example of this type of claim arises in the event a company is defrauded by its executives and directors. Under United States law, corporate executives and directors owe a fiduciary duty that obligates them to act in the best interest of the company. They are subject to liability if they enrich themselves at the expense of shareholders.

Common law fraud claims

Fraud victims can resort to a variety of common law and statutory fraud claims. The requirements for these claims vary from state to state and statute to statute, but they generally apply where a victim relies to his or her detriment on another's intentional misstatement or omission.[7] Fraud claims do not require that the perpetrator have any special relationship with his or her victim and can entitle a successful plaintiff to both compensatory and punitive damages.

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3 See *Boyle v. United States*, 556 US 938, 944-45 (2009).

4 See 28 USC Section 1962.

5 See, for example, *Norex Petroleum Ltd v. Access Industries Inc*, 631 F.3d 29 (2d Cir. 2010).

6 *European Community v. RJR Nabisco Inc*, 2014 WL 1613878, at *4 (2d Cir. 23 April 2014).

7 Restatement (Second) of Torts, Section 525.

Fraud victims often find that stolen assets have been dissipated by the time they have sufficient information to bring a claim. In such a circumstance, it often makes sense to bring claims against those who assist the perpetrators of the fraud. US courts recognise traditional claims for aiding and abetting fraud and conspiracy to commit fraud. Meanwhile, accomplices may be held liable to the same extent as the principal perpetrators.

In some cases, perpetrators will abuse the corporate form to commit fraud in the hope that the limited liability afforded to corporations under US law will defeat any claims against them directly, leaving victims with recourse only against the corporation itself, which may be insolvent. These circumstances call for application of alter ego and veil-piercing theories of liability. Alter ego allows courts to disregard corporate structures and find that separate legal entities should be treated as one and the same for purposes of particular claims. Similarly, veil piercing allows courts to use their equitable powers to hold an entity's owners liable for the obligations of the entity. The specific facts required to support this theory vary from state to state, but courts typically will consider whether 'those in control of a corporation' did not 'treat the corporation as a distinct entity' and, if they did not, whether the specific facts show fraud or misuse of the corporate form.[8] Thus, a parent company or an individual owner who uses a company to commit fraud may be directly liable to the victims under appropriate circumstances.

These principles were applied in the case of *Motorola Credit Corp. v. Uzan*.[9] A New York Federal Court found that Libananco Holdings (a Cypriot company) was the alter ego of members of the Uzan family in Turkey. The court ruled that any potential recovery by Libananco in a pending international arbitration against the Republic of Turkey must be used to pay the victims of a fraud perpetrated by the Uzans. The court concluded that claimants Motorola and Nokia presented sufficient evidence to show that Libananco was a corporate alter ego of the Uzan family and that Libananco's corporate veil could be pierced so as to permit Motorola and Nokia to enforce their fraud judgment against the Uzans. Thus, the court ordered Libananco to turn over any property to claimants that could be used to make good on the fraud judgment, including any recovery in the arbitration.

Fraudulent conveyances

Where assets have been fraudulently transferred to thwart potential claims, the transfer may be set aside. Many states have enacted fraudulent transfer statutes that allow a creditor to reverse a transfer that was made for less than fair consideration or with an intent to thwart creditors.[10] A showing of fraudulent transfer requires, among other elements, the presence of 'badges of fraud' often found in transactions designed to thwart creditors. Examples include transfers: (1) between related parties; (2) for less than fair consideration; (3) involving entities with inadequate capitalisation; (4) involving sham entities; (5) that result in the transferor becoming insolvent; (6) where the transferor

8 *Mobil Oil Corp. v. Linear Films Inc*, 718 F. Supp. 260, 269 (D. Del. 1989).

9 739 F. Supp. 2d 636 (S.D.N.Y. 2010).

10 NY Debtor & Creditor Law, Section 276.

retains possession or control over the transferred assets; and (7) in response to pending litigation or other claims.[11]

Other considerations

The chances of successful recovery by victims of fraud are difficult to quantify because they depend on a variety of factors. Chances are best if the claims are based on documentary evidence and there are assets available in the United States to satisfy any judgment. US courts will focus heavily on e-mails and other documents as evidence of fraud. Without a 'paper trail' evidencing the fraud, courts may be sceptical of claims and may dismiss them at an early stage. Meanwhile, assets have often been squandered or hidden away such that nothing may be readily available to satisfy a judgment, even if the fraud claim succeeds. Fraud victims should consider whether the potential recovery merits the risks and expense of a lawsuit.

Other procedural considerations include timing and standing. The time frame within which a fraud claim may be commenced is dictated by statute, with the period in New York being six years after discovery of the fraud.[12] Because fraud is often committed in a manner designed to avoid detection, the statutory time period may be extended depending on when the victim was on notice of the fraudulent conduct.[13]

Once on notice, any victim of fraud ordinarily has standing to bring a lawsuit, with one notable exception. Shareholders who believe that a company's officers or directors have engaged in fraud may be required to ask the company to bring a claim. If the company declines to bring a claim against its officers and directors, then shareholders may be able to sue in their own right.[14]

Finally, the 'American rule' is that a litigant may not collect attorneys' fees, even if a claim results in a favourable judgment. There may be times when fees are available, for example, because they are provided by an applicable agreement or statute, but these cases are the exception. Victims contemplating litigation in the United States should take into account that they are likely to have to pay their own legal fees and costs.

ii Defences to fraud claims

Defences to fraud claims vary with the facts of each case. Claimants should consider whether the perpetrators are subject to personal jurisdiction in the United States and whether there is an alternative forum with a greater interest in the matter at issue. Personal jurisdiction in a US court may be established if the defendant has continuous and systematic contacts there – such as doing business in the United States – or if the defendant can be served with legal process while located in the United States.[15] Alternatively, jurisdiction may be established if the fraudulent conduct either occurred

11 *Silverman v. Actrade Capital Inc (In re Actrade Fin Techs Ltd)*, 337 B.R. 791, 809 (Bankr. S.D.N.Y. 2005); see also Uniform Fraudulent Transfers Act, Section 4(b).

12 N.Y. Civ. Prac. L. & R. 213.

13 N.Y. CPLR 203(g).

14 See *Kamen v. Kemper Fin Servs*, 500 US 90 (1991); Fed. R. Civ. P. 23.1.

15 See *Burnham v. Superior Court*, 495 US 604, 618 (1990).

in the United States or had a direct effect in the United States. This type of jurisdiction is governed by state 'long-arm' statutes, which can vary from state to state.[16]

A related defence is the doctrine of *forum non conveniens*, which holds that a court has discretion to dismiss a claim if there is an adequate alternative forum with a greater connection to the underlying misconduct.[17] Courts consider a variety of factors in making this determination, with no single factor being dispositive. Like the issue of personal jurisdiction, *forum non conveniens* may be raised at the outset of a lawsuit and, if successful, will result in early dismissal. Unlike personal jurisdiction, the doctrine is discretionary, making it harder to successfully appeal an unfavourable ruling.

Fraud claims also are subject to a heightened pleading standard. For example, federal courts require claimants to 'state with particularity the circumstances constituting fraud,' including specific misstatements along with the speaker, time and place.[18] This requirement may pose a problem for the victim of fraud, who is unlikely to be informed of the details of the scheme. Nevertheless, failure to plead sufficient details will result in dismissal.

Of course, avoiding early dismissal is just the first step and does not prevent a defendant from establishing defences to the merits of the fraud claim – for example, that the conduct at issue was not fraudulent or was not the cause of the injury to the claimant, or that the claimant willingly participated in the scheme.

One substantive issue that can pose a significant obstacle to fraud claims is whether the claimant fulfilled the duty to investigate the circumstances alleged to constitute the fraud. If a fraudulent misrepresentation involves facts that are known to the victim, or that are obvious to the victim, then courts may conclude that the victim's alleged reliance on the misrepresentation was not justified, thereby precluding recovery. The fraud laws vary across the 50 states on this issue. Some require victims to conduct a reasonable investigation whenever they are aware of facts indicating that the perpetrators' representations may be false. Others provide that mere suspicious circumstances do not trigger a duty to investigate and a victim may claim justifiable reliance on the misrepresentation, even if a reasonable investigation would have uncovered the fraud.

A related obstacle arises in the context of fraud claims based on concealment or non-disclosure of information. If a perpetrator intentionally conceals a material fact and prevents the victim from discovering it, then a fraud claim may be pursued. On the other hand, simply failing to disclose a material fact is actionable only if the perpetrator is under a duty to the victim to exercise reasonable care to disclose the fact in question.[19]

16 For example, N.Y. CPLR 302.

17 See *Piper Aircraft Co v. Reyno*, 454 US 235 (1981); *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474 (1985).

18 Fed. R. Civ. P. 9(b).

19 Restatement (Second) of Torts, Section 551.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

State law governs the procedure for securing assets, either before or after a judgment. Even if the litigation occurs in federal court, the federal rules provide that state law governs enforcement remedies.[20] State laws are not uniform on these remedies. It is useful, however, to consider the example set by New York law because of New York's status as a financial centre and its robust anti-fraud and pro-judgment enforcement regime.

Prejudgment restraints of assets

Prejudgment attachment of assets

A claimant may seek prejudgment attachment in state or federal court in aid of an impending litigation or arbitration even before any claims are filed. New York law expressly permits such an action and in the federal courts prejudgment attachment is available to the extent permissible under state law.[21] The substantive requirements for obtaining prejudgment attachment are: (1) the existence of a cause of action; (2) a probability that the plaintiff will succeed on the merits; (3) that any award will be rendered ineffectual without relief; and (4) the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.[22] The additional requirements ordinarily necessary for injunctive relief – irreparable harm and the balance of the equities tipping in the applicant's favour – are not required to obtain an attachment, if the attachment is sought in aid of a foreign arbitration.[23] If successful, a prejudgment attachment order can be used to freeze assets belonging to or controlled by the defendant, so long as such assets are within the jurisdictional reach of the court.

Restraining notices

A restraining notice, when available, such as under New York law, can be a powerful enforcement tool. In contrast with attachment and garnishment orders – which are directed at specific property – a restraining notice is similar to an injunction and broadly restrains assets or debts belonging to the judgment debtor. Upon service of a restraining notice on a third party, all of a defendant's property in the possession or thereafter coming into possession of the third party as well as all debts then due or thereafter coming due are subject to the restraining notice.[24] A claimant can use this remedy in conjunction with either a prejudgment attachment order or a final judgment for the purpose of restraining any assets held by the defendant or third parties.

20 Fed. R. Civ. P. 64 & 69.

21 See Fed. R. Civ. P. 64.

22 N.Y. CPLR 6212 (a).

23 *SiVault Sys Inc. v. Wondernet Ltd*, No. 05 Civ. 0890, 2005 WL 681457, *3 (S.D.N.Y. 2005).

24 N.Y. CPLR 5222.

Garnishment

Garnishment is a mechanism whereby a claimant can enforce the payment of a debt or claim by pursuing assets of the defendant in the possession of third parties. Garnishment is similar to attachment and is used where the assets to be attached are in the possession of someone other than the defendant. The use of garnishment may be particularly effective where a third party owes a debt to the defendant. The debt can be paid to the claimant, with the amount credited toward the outstanding balance of the unpaid claim or debt.

Replevin

Replevin is an infrequently used remedy that a claimant may invoke to recover specific property that has been wrongfully taken by the defendant. Unlike the more common remedy of money damages, replevin seeks the return of the property itself. This remedy may be appropriate in situations where a defendant has wrongfully taken unique, high-value property. To obtain replevin, a claimant must show that the defendant possesses (either actually or constructively) a specific and identifiable item of personal property in which the claimant has a superior right of possession, that right being both immediate and not contingent on a condition precedent.

Sequestration

Sequestration may be available where a corporation fails to satisfy a judgment against it. A claimant may commence an action and obtain a court order sequestering the corporation's property and providing for distribution thereof. All of the corporation's creditors are entitled to share in the distribution. It should be noted that this remedy is only available to claimants with unsatisfied judgments upon proof that other judgment enforcement remedies have been exhausted.

Preliminary injunctions restraining assets

Injunctive relief in the United States is somewhat limited. Most notably, unlike in the United Kingdom and other jurisdictions, the *Mareva* injunction – a general, worldwide freezing order – has been expressly prohibited by a 5–4 decision of the United States Supreme Court in *Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund Inc.*[25] The court held that a US federal court lacks the power to issue prejudgment injunctions freezing a defendant's assets in order to ensure their availability for a future judgment of money damages, unless the claimant can demonstrate a legal or equitable interest in particular property. Thus, to obtain a prejudgment restraint of a particular asset, a claimant must demonstrate some nexus between the subject funds or assets to be attached or otherwise restrained and the claim. Federal courts are without authority to issue any sort of worldwide freezing order restraining a defendant's assets pending adjudication of a claim. As discussed immediately below, however, post-judgment remedies are far broader and do not require the same level of specificity; a general injunction against the judgment debtor and its assets will suffice.

25 527 US 308 (1999).

Post-judgment enforcement

Writ of execution

A money judgment is enforced by a writ of execution, unless the court directs otherwise.[26] A writ of execution is the process by which a court aides a judgment creditor by seizing a judgment debtor's non-exempt property or assets, up to an amount sufficient to satisfy the judgment. The writ of execution orders a duly authorised officer of the state – a US marshal, a sheriff or other agent acting under colour of law – to seize real or personal property, sell it and transfer the proceeds (fewer costs).

The writ is available against third parties who are in possession of a debtor's assets. In this circumstance, the debtor must be notified of the creditor's intent to proceed against the assets. A third party who violates a writ, or otherwise assists the debtor to avoid execution thereof, may be held liable to the creditor for the value of any assets that were dissipated or otherwise made unavailable for execution of the writ.

Turnover orders

Post-judgment, turnover orders are particularly useful tools because they can require a judgment debtor to transfer and turn over to the judgment creditor enough assets to satisfy a judgment regardless of where those assets are located, potentially including assets located outside the United States.[27] Turnover orders also can be directed to third parties, such as banks, who possess the defendant's assets, as long as those third parties are subject to the court's jurisdiction.[28] The New York Court of Appeals has held that a turnover order directed at a third party is effective against specific property, even if that property is located outside New York or the United States.[29] The precise reach of these orders remains an unresolved issue.

Receivers

If a judgment is obtained by the claimant and remains unpaid, a receiver may be appointed by the court to take charge of assets in which the defendant has an interest.[30] This remedy may be appropriate in situations where merely seizing and selling the assets is not workable. For example, a receiver may be appointed to manage distressed assets, collect rents due or arrange for liquidation of assets. In certain circumstances, a receiver can also be appointed before trial to preserve the status quo.

Invoking a court's equitable powers for post-judgment enforcement

Even though a writ of execution is the primary means by which money judgments are enforced in the United States, federal courts have equitable powers to enforce judgments under 'extraordinary circumstances'.[31] Such relief is not common, perhaps because, as

26 See Fed. R. Civ. P. 69.

27 N.Y. CPLR 5225.

28 N.Y. CPLR 5225(b).

29 *Koehler v. Bank of Bermuda Ltd*, 12 N.Y.3d 533 (N.Y. 2009).

30 N.Y. CPLR 5228.

31 See *Motorola Credit Corp. v. Uzan*, 288 F. Supp. 2d 558, 561 (S.D.N.Y. 2003).

one court has observed, the ordinary 'difficulties in enforcing the judgment due to the location of the assets and the uncooperativeness of the judgment debtor are not the types of extraordinary circumstances that warrant departure from the general rule that money judgments are enforced by means of writs of execution rather than by resort to the contempt powers of the courts'.[32]

ii Obtaining evidence

US courts allow broad discovery in litigation. Information that is relevant or that may lead to the discovery of admissible evidence is ordinarily discoverable.[33] Moreover, discovery from third parties is available by subpoena, which can be issued by the claimant's attorney, although third parties are not expected to provide the same broad discovery required of the parties themselves.

Assuming the claimant obtains a judgment, additional discovery, including third-party discovery, is permitted in aid of judgment enforcement.[34] A claimant may seek discovery from the defendant or third parties such as banks (where the defendant may keep cash and other assets). If the defendant is an entity, discovery may include its owners and subsidiaries in an effort to locate assets (or information leading to assets) that could be executed against. Notably, the United States Supreme Court has held that sovereign immunity does not restrict the normal post-judgment discovery available in United States courts, meaning that broad discovery should be available to claimants even if their judgments involve foreign sovereigns.[35]

Objections to discovery include over breadth, undue burden or expense and privilege and privacy concerns. Privilege concerns allow the producing party to withhold documents and information entirely, subject to objection by the requesting party, which may be resolved by the court. Other objections can sometimes be resolved through the parties' negotiation. If not, the requesting party may file a motion to compel production of the documents and information at issue.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Bank fraud and money laundering are crimes in the United States. Depending on the nature of the crime, an investigation could be commenced by federal authorities, state authorities, or both. On occasion, an investigation will result from information provided by a victim or concerned citizen. However, the investigation will be dictated by the law enforcement authorities, who have discretion to decline to file criminal charges. If

32 *Cordius Trust v. Kummerfeld*, No. 99 Civ. 3200 (DLC), 2009 WL 3416235 at *7 n.8 (S.D.N.Y.. Oct. 23, 2009) (Cote, J) (issuing a quitclaim deed for real property owned by the judgment debtors).

33 Fed. R. Civ. P. 26(b)(1).

34 See Fed. R. Civ. P. 69(a)(2); N.Y. CPLR 5223.

35 See *Republic of Argentina v. NML Capital Ltd*, 134 S.Ct. 2250 (2014).

charges are filed, the authorities may negotiate a plea bargain with the defendant, or they may proceed to a jury trial.

Criminal penalties are provided by statute and may be imposed by a court if the defendant is convicted of the crimes. Penalties may include fines, incarceration, probation and community service. They often do not involve any recovery for victims. If restitution to the victims is an available penalty, it still may not fully compensate the victims for their losses.

As a result, victims of banking fraud or money laundering may wish to consider bringing a civil lawsuit. Civil claims may proceed in conjunction with criminal charges or in the absence of charges. The burden of proof is lower in civil litigation, meaning that a civil claim may succeed even if criminal charges do not result in a conviction.

ii Insolvency

A wrongdoer's insolvency can pose significant challenges to victims of fraud. An insolvent individual may be judgment-proof; an insolvent entity may enter bankruptcy. The bottom line is that the compensation available to victims may be minimal.

Bankruptcies ordinarily proceed in the US bankruptcy courts. A trustee is appointed and may pursue claims on behalf of creditors, including those with legal claims against the bankrupt party. Transfers of assets made 90 days prior to the bankruptcy filing may be set aside and the clawback period may extend as far back as one year if the transfer involved an insider.[36] *Pro rata* distributions of proceeds recovered by the trustee will be made according to the priority of the creditors' claims. Secured creditors are paid first. Unsecured creditors, including judgment creditors, may be left with no recovery at all.

A special case of fiduciary duty arises where a victim of fraud obtains a judgment against an entity that becomes insolvent while the claim is pending or after the judgment has been obtained. In this circumstance, the law may impose a fiduciary duty in favour of the entity's creditors, including judgment creditors.[37] This means that the judgment creditor is to be treated with the same care as a shareholder and may have the same rights to recover against the entity's management for violation of the fiduciary duty. Moreover, a creditor may be able to set aside and recover transfers of assets that either rendered the entity insolvent or occurred after the point of insolvency.

iii Arbitration

United States courts strongly favour arbitration. The Federal Arbitration Act (FAA) establishes 'a liberal federal policy favouring arbitration agreements'.[38] This liberal policy applies to enforcement of not only arbitration agreements, but also awards rendered pursuant to these agreements.

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36 11 USC Section 1147(b).

37 See *Geyer v. Ingersoll Publ'ns*, 621 A.2d 784, 787 (Del. Ch. 1992) ('Under Delaware law, creditors of an insolvent corporation are owed fiduciary duties').

38 *Moses H Cone Memorial Hospital v. Mercury Constr Corp*, 460 US 1, 24 (1983).

Before an award is even rendered, some jurisdictions – New York, for example – authorise provisional remedies to secure assets for satisfaction of the award.[39] Also, discovery may be authorised in aid of arbitration.

After the award is rendered, the FAA provides three avenues for enforcement as a judgment of a US court. For awards rendered in the United States, application for judgment may be made in the United States district court for the district where the arbitration was conducted.[40]

For international arbitrations, confirmation of the award may be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Assuming the Convention's criteria are satisfied, a judgment may be obtained through a summary proceeding in any district court having jurisdiction over the defendant.[41] This proceeding is not intended to involve complex factual determinations and is concerned only with the seven defences to confirmation under the Convention, as well as personal jurisdiction and venue issues.[42] Recent guidance from the US Supreme Court has focused on the question of personal jurisdiction, and a claimant seeking to confirm an award should consider carefully which US court, if any, may have jurisdiction over the award debtor.[43]

A third option is available if the award falls under the auspices of the Inter-American Convention on International Commercial Arbitration. The Inter-American Convention applies where the 'majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States'.[44] The arbitration must arise from a commercial relationship and must not involve only United States citizens.[45] The arbitral award must be confirmed by a United States court in order to become a final and enforceable judgment. Confirmation is mandatory unless the court finds one of the seven grounds for refusal under the Convention.[46] The court also may vacate or modify the award under the limited circumstances set out by the FAA.[47]

iv Fraud's effect on evidentiary rules and legal privilege

US rules of evidence and procedure recognise a powerful attorney–client privilege that shields legal communications from discovery. This privilege can sometimes hamper a

39 N.Y. CPLR 7502.

40 9 USC, Section 9.

41 9 USC, Section 207.

42 See *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007).

43 See *Sonera Holding BV v. Cukurova Holding AS*, 750 F.3d 221, 225 (2d Cir. 2014) (discussing *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), and reversing judgment confirming arbitral award due to lack of personal jurisdiction).

44 9 USC, Section 305.

45 9 USC Section 202.

46 See *Banco de Seguros del Estado v. Mutual Marine Offices Inc*, 257 F. Supp. 2d 681, 686 (S.D.N.Y. 2003).

47 Id.; see also 9 USC, Section 10(a) (as to vacatur) and Section 11 (as to modification).

claimant's ability to prove a claim because it prevents discovery of some documents and communications that contain important information.

The privilege is not inviolable, however, and fraud can nullify privilege in some cases. Privilege may be waived where the perpetrator uses counsel's advice or services to accomplish a crime or fraud. This is true even if counsel does not know of the fraud.

In *United States v. Zolin*, the US Supreme Court set out the process for courts to follow when evaluating the fraud exception to privilege.[48] The claimant must make a *prima facie* showing of fraud, which the Court described as 'a factual basis adequate to support a good faith belief by a reasonable person […] that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies'.[49] If this showing is made, the court then has discretion to review in camera the privileged documents and determine whether the privilege should be nullified and what materials should be produced to the claimant.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Choice of law in fraud claims can be complicated, especially where the conduct at issue occurred in multiple jurisdictions. In the United States, the issue is governed by state law and the applicable legal principles can vary significantly from state to state.

The first question is whether there is a contract or other document governing the relationship between the parties and if so, whether it contains a choice-of-law provision. US courts will enforce contractual choice-of-law clauses and may interpret those clauses to encompass tort claims as well as contract claims. This is often the case when the parties have engaged in a commercial transaction that in turn gives rise to the fraud and the applicable agreements contain a broad provision controlling all claims arising from or related to the parties' business dealings. Victims of fraud should consider whether they have entered into any contracts containing choice-of-law clauses.

The particular language is important. A provision stating that a contract is 'governed by' a certain state's law may not be enough to encompass fraud claims and other tort claims.[50] By contrast, in *Turtur v. Rothschild Registry International Inc*, it was held that a fraud claim was subject to a contractual choice-of-law provision because the parties had agreed to apply New York law to 'any controversy or claim arising out of or relating to' their contract.[51]

In the absence of a contractual choice of law, a court will identify the jurisdictions that have an interest in the matter at issue. The first question is whether the result will differ depending on which jurisdiction's law applies. In the absence of a different result, if

48 491 US 554 (1989).

49 Id. at 572.

50 See *Knieriemen v. Bache Halsey Stuart Shields Inc*, 74 A.D.2d 290, 427 N.Y.S.2d 10 (App. Div. 1st Dep't 1980), overruled on other grounds, *Rescildo v. RH Macy's*, 187 A.D.2d 112, 594 N.Y.S.2d 139 (App. Div. 1st Dep't 1993).

51 26 F.3d 304, 309-10 (2d Cir. 1994).

there is no conflict, there will be no need to perform a choice-of-law analysis. If a conflict is found, a court will apply the conflict-of-laws principles of the jurisdiction where the court is located. Several different governing principles have been applied to fraud claims in this situation. Currently, the majority view is that the law to be applied is the law of the jurisdiction with the most significant relationship to the fraud claim, as determined by analysis of all the facts and circumstances surrounding the case.[52] In this analysis, 'the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort'.[53]

ii Collection of evidence in support of proceedings abroad

US federal district courts have the power to order discovery for use in a foreign legal proceeding.[54] The district court must find that (1) the party from whom discovery is sought can be found in the district where the application is made; (2) the discovery will be used in a proceeding before a foreign or international tribunal; and (3) the party applying for discovery is an interested person in the foreign proceeding.[55]

A person is 'found' wherever (1) he or she maintains a residence, even if only temporary or part-time; or (2) wherever he or she is personally served with the discovery requests. Entities are 'found' wherever they maintain corporate headquarters or conduct continuous activities.[56]

Proceedings 'before a foreign or international tribunal' include proceedings in foreign courts, as well as administrative proceedings and government investigations.[57] The proceeding must be within reasonable contemplation but is not required to be 'pending' or 'imminent'.[58] There is some dispute whether a private foreign arbitration qualifies as a proceeding for which discovery may be ordered. Recently, it was settled that Section 1782 authorises discovery for use in a foreign criminal investigation conducted by a foreign investigating magistrate.[59] The discovery was requested for use in a Swiss criminal investigation, which the court found to be 'exactly the type of proceeding' that Section 1782 was intended to reach.[60]

The final requirement of an 'interested person' is a term of art that includes litigants, investigating magistrates, administrative and arbitral tribunals, quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts.[61]

52 Restatement (Second) of the Law of Conflicts, Section 148.

53 *AroChem Int'l Inc v. Buirkle*, 968 F.2d 266, 270 (2d Cir. 1992).

54 28 USC Section 1782.

55 See *Intel Corp. v. Advanced Micro Devices*, 542 US 241, 248-49 (2003).

56 See *In re Edelman*, 295 F.3d 171, 179 (2d Cir. 2002); *In re Godfrey*, 526 F. Supp. 2d 417, 422 (S.D.N.Y. 2007).

57 *Intel Corp v. Advanced Micro Devices Inc*, 542 US 241, 258 (2004).

58 *Intel Corp*, 542 US at 259.

59 *In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings*, 773 F.3d 456 (2d Cir. 2014).

60 Id. at 461.

61 Ibid.

Discovery under Section 1782 includes both deposition testimony and document production.[62] It may be obtained by first filing an application and supporting memorandum and affidavit with the federal district court (or courts) where the subjects of the discovery are located. If the application is granted, the applicant may serve requests for documents and depositions. A federal district court may allow broad discovery and the fact that such discovery may be broader than the discovery authorised by the foreign forum – or may not be admissible evidence in the foreign forum – is typically not relevant. The ultimate decision whether to order discovery is within the discretion of the federal district court.[63]

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

In contrast to their broad authority to order discovery, United States courts have a more limited ability to secure assets or proceeds of fraud in aid of a foreign proceeding. If a defendant is subject to personal jurisdiction, prejudgment remedies will then be available in support of the litigation. However, it is not always clear whether an attachment may be issued in aid of a foreign lawsuit. Some state attachment statutes can be read to permit this, but the case law on this issue is not well developed.

In the context of arbitration, by contrast, some states explicitly allow attachments in aid of foreign arbitrations, New York being one of them.[64] In the matter of *Mobil Cerro Negro Ltd v. PDVSA Cerro Negro SA*, for example, the claimant, a subsidiary of ExxonMobil, successfully obtained a pre-award attachment of more than $300 million in New York bank accounts, pending resolution of an arbitration before the International Chamber of Commerce seeking compensation from the government of Venezuela and its state-owned oil company for the illegal expropriation of the claimant's interest in a joint venture to exploit oil reserves in Venezuela's Orinoco Belt.[65] This is but one example of the willingness of US courts to freeze assets in aid of arbitration.

iv Enforcement of judgments granted abroad in relation to fraud claims

US courts take a liberal approach in recognising and enforcing foreign judgments. The judgment debtor, however, does have some ability to challenge a foreign judgment. Recognition and enforcement of foreign judgments is a matter of comity and is governed by state law. Some states have codified the process, generally following some version of the Uniform Enforcement of Foreign Judgments Act. Others rely on the common law, which is described in *Hilton v. Guyot*,[66] and the Restatement of Foreign Relations Law Sections 481 and 482.

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62 See *Intel Corp*, 542 US at 249.

63 Ibid. at 265.

64 N.Y. CPLR 7502.

65 See *Order Confirming Attachment, Mobil Cerro Negro Ltd v. PDVSA Cerro Negro SA*, No. 07 Civ. 11590 (DAB) (S.D.N.Y. 3 January 2008). The authors of this chapter were counsel of record for the claimant in this action.

66 159 US 113 (1895).

Ordinarily, the foreign judgment to be recognised originates from a civil proceeding, but it also may be possible for foreign criminal court judgments to be recognised and enforced to the extent they award compensation for actual damages suffered. In a matter of first impression, one New York appellate court held that 'the courts of this state must recognize a foreign country judgment issued by a [Czech] criminal court awarding a sum of money as compensation for damages sustained by the victim of a fraudulent scheme'.[67] The court reasoned that the judgment was not an unenforceable penalty because the purpose was 'to compensate the victim for actual damages'.[68] Thus, the court allowed the victim to attach the judgment debtor's bank account funds located in New York.

The recognition process should be distinguished from the enforcement process. Most courts require a separate action to recognise the judgment before it may be enforced. The judgment must be final – it must conclusively resolve the dispute between the parties. The court in which recognition is sought must have jurisdiction either over the judgment debtor's assets or over the judgment debtor.[69] Additional mandatory grounds for refusing to recognise a foreign judgment are: (1) where the foreign court did not afford basic due process of law to the defendant; (2) where the foreign court lacked jurisdiction over the defendant or the property at issue; or (3) where the foreign court lacked subject matter jurisdiction over the dispute.

US courts recognise several discretionary reasons to refuse enforcement of foreign judgments. Fraud is one of them. Typically, the fraud must be 'extrinsic fraud' such that the judgment debtor was prevented from adequately presenting its case to the foreign court. This could occur where, for example, the judgment creditor withheld evidence from the foreign court or the court was corrupt.

A US court ordinarily will not refuse to enforce a foreign judgment on the basis of 'intrinsic fraud,' including the veracity of testimony and the authenticity of documents. These matters are dealt with by the foreign court and are not subject to re-examination by US courts.

If successful, a recognised judgment becomes a local judgment enforceable under local law and entitled to full faith and credit in other courts within the United States. As such, the judgment creditor may invoke any enforcement remedies available under local law, assuming that assets are within the jurisdiction of the court. Presumably, if assets or proceeds of fraud are not located within the United States, there would be little reason to undertake the process of recognising the foreign judgment there.

67 *Harvardsky Prumyslovy Holding AS-V Likvidaci v. Kozeny*, 117 A.D.3d 77, 983 N.Y.S.2d 240, 241 (1st Dep't 2014).

68 Id. at 243.

69 The precise requirements vary from state to state and some courts may require personal jurisdiction over the judgment debtor as a prerequisite to recognition.

VI CURRENT DEVELOPMENTS

i Separate-entity rule

The 'separate-entity' rule is a feature of New York law that operates to prevent foreign branches of banks in New York from being subject to enforcement proceedings and orders in New York courts. Under the rule, each branch of a bank is treated as a separate entity, in no way responsible for accounts at other branches of the same bank. The practical impact of the rule is to prevent a claimant from attaching assets held at bank branches outside the United States simply by serving a restraining notice or commencing other enforcement proceedings against the bank's New York branch.

The continued force of the separate-entity doctrine as applied to monetary transfers within banks is somewhat in question after a recent decision in *Koehler v. Bank of Bermuda Ltd*.[70] In *Koehler*, the New York Court of Appeals ruled that a 'court sitting in New York that has personal jurisdiction over a garnishee bank can order that bank to produce stock certificates located outside of New York'.[71] But the court's inquiry in *Koehler* was limited to tangible property, such as the stock certificates, and did not consider the separate-entity rule or turnover orders directed at cash in a bank account.

Application of *Koehler* resulted in a split among New York state and federal courts, with some re-affirming the separate-entity rule and others casting further doubt on its viability. In the case of *Ayyash v. Koleilat*,[72] the claimant won a judgment in a Lebanese court for fraud related to the collapse of a Lebanese bank. After registering the judgment in New York, he sought to discover and freeze the judgment debtor's assets on deposit with various banks that had branches or subsidiaries in New York. He served subpoenas and restraining notices that purported to apply to any branch or office maintained in a foreign country. After objection by the banks, the state trial court in Manhattan denied the claimant's request for asset discovery and re-affirmed the separate-entity rule. On appeal, however, the appellate division chose to affirm without invoking the separate entity rule, reasoning that 'denying the enforcement procedures sought by plaintiff' was proper because 'they would likely cause great annoyance and expense' and because of 'principles of international comity'.[73]

By contrast, in *Amaprop Ltd v. Indiabulls Financial Services Ltd*,[74] the federal district court in Manhattan held that a restraining notice served on ICICI Bank was valid and enforceable with respect to all funds and property of the judgment debtor held anywhere in the world and directed the transfer of such assets to ICICI Bank's New York branch for turnover to the judgment creditor. The decision was appealed to the Second Circuit Court of Appeals, but the parties settled before an appellate decision was issued. Also, in *Hamid v. Habib Bank Ltd*, the Chief Judge of the Southern District of New York held that the separate-entity doctrine continues to apply but certified the matter

70 12 N.Y.3d 533, 883 N.Y.S.2d 763 (2009).

71 Id. at 541.

72 38 Misc. 3D 916 (N.Y. Sup. Ct. 2012).

73 *Ayyash v. Koleilat*, 981 N.Y.S.2d 536 (N.Y. App. Div. 1st Dep't 2014).

74 No. 10-cv-1853 (S.D.N.Y. 21 February 2012).

for interlocutory appeal to the Second Circuit.[75] The appeal was dismissed for lack of prosecution.[76]

The issue was addressed again in the long-running dispute between Motorola and Nokia, on the one hand, and the Uzan family on the other. In that case, a New York federal court ruled that the separate-entity doctrine prevented a restraining order from being effective against deposits held at a foreign branch of a bank doing business in New York.[77] The court ordered release of the restraint but stayed its order to allow the claimants to appeal, which they did, and the Second Circuit Court of Appeals certified the question to the New York Court of Appeals to resolve whether the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank.

In a 5-2 decision in *Motorola Credit Corp. v. Standard Chartered Bank*, the New York Court of Appeals upheld the 'separate entity' rule as a well-established feature of New York common law, noting the benefit to financial institutions and the need to mitigate '[t]he risk of competing claims and the possibility of double liability in separate jurisdictions'.[78] The dissent offered a markedly different perspective, opining that 'today's holding is a deviation from current public policy regarding the responsibilities of banks and a step in the wrong direction' and calling the decision a boon to recalcitrant debtors who flout New York judgments at the expense of 'the rights of judgment creditors to enforce their judgments'.[79]

The *Motorola* decision presents challenges and opportunities for victims of fraud who obtain judgments against the perpetrators. Those who come to New York for its connections to the international banking system and creditor-friendly remedies will find their efforts to be more complicated, at least to the extent that they pursue assets held by banks. On the other hand, the Court did not overrule the *Koehler* decision, thus preserving the ability of a judgment creditor to reach assets outside New York, provided that the garnishee is properly subject to jurisdiction in New York.

The *Motorola* dissent is not the first to criticise the separate-entity rule as out of date. In January 2011, the New York Advisory Committee on Civil Practice recommended that the rule be repealed so that service of levies, restraining notices or orders of attachment upon a New York bank branch would apply to any account held by the bank anywhere. The report reasoned that:

> *[t]he now ubiquitous use of computer networks that give all branch offices of a financial institution instantaneous access to central data banks makes the limitation of the separate-entity rule obsolete and its continued existence unnecessarily complicates and limits enforcement of judgments and attachments without any mitigating benefit to concepts of fairness or the functioning of the civil justice system.*

75 11-CV-920 (LAP), 2012 WL 919664 (S.D.N.Y. 14 March 2012).

76 *Hamid v. Habib Bank Ltd*, No. 12-1481, 2012 WL 4017287 (2d Cir. 14 August 2012).

77 See *Motorola Credit Corp v. Uzan*, No. 02-cv-666 (S.D.N.Y. 1 August 2013).

78 24 N.Y.3d 149, 162 (N.Y. 2014).

79 Id. at 164.

Of course, banks are hardly the only entities that do business both in the United States and abroad. Where such an entity is subject to United States jurisdiction (because it does business there) and holds assets or proceeds acquired by fraud, the argument can be made for extending the judicial power to reach those assets, regardless of where they are located.

ii Correspondent banks

Another recurring issue is financial institutions' handling of debt service payments made by a debtor that owes unsatisfied judgments. Debt service payments by the judgment debtor are attachable at the originating bank, but the bank may be located in a jurisdiction that lacks robust laws facilitating the enforcement of judgments. Meanwhile, there is a good chance that one of the other banks involved – the correspondent bank or the beneficiary bank – may be located within a more creditor-friendly jurisdiction.

For example, under New York law, funds transferred to a correspondent bank may be attachable. The correspondent bank may elect to either freeze the funds or complete the transaction – either way, the bank is not liable to the judgment creditor or the judgment debtor for any claim relating to its decision to freeze – or not to freeze – the funds.[80] A correspondent bank located in a creditor-friendly jurisdiction may offer an improved opportunity for a claimant to enforce an unsatisfied judgment against a debtor's funds.

Once the debtor's funds reach the beneficiary bank, they are unlikely to be attachable. However, one court in the Southern District of New York recently considered issuing an injunction to prevent a beneficiary bank from accepting the funds. The case settled before the issue was resolved. Thus, it remains to be seen how the courts will decide this issue.

iii Sovereign immunity from post-judgment discovery

On 16 June 2014, the United States Supreme Court issued a pivotal ruling that makes it easier for judgment creditors to obtain discovery of assets held by foreign sovereigns. In *Republic of Argentina v. NML Capital Ltd*,[81] the Court held that the Foreign Sovereign Immunities Act (FSIA) does not immunise a foreign sovereign judgment debtor from post-judgment discovery of information concerning its extraterritorial assets. The Court made clear that 'execution immunity' does not protect a sovereign from discovery – instead, only after discovery should a district court determine whether any assets are immune. Thus, the judgment creditor was allowed to pursue broad, worldwide discovery in aid of execution.

The case arose out of efforts by creditors of Argentina to collect on bonds on which Argentina had defaulted in 2001. Although most bondholders agreed to exchange their bonds for restructured debt after Argentina's 2001 default, several hedge funds bought up defaulted bonds and chose to pursue collection remedies in New York rather than

80 See *Palestine Monetary Auth v. Strachman*, 62 A.D.3d 213, 873 N.Y.S.2d 281 (1st Dep't 2009).

81 573 U.S (2014), No. 12-842 (16 June 2014).

participate in the exchange. The respondent, NML Capital, prevailed in 11 debt-collection actions in the US District Court for the Southern District of New York. It then sought global discovery of Argentina's assets by serving subpoenas on non-party banks, and the district court granted a motion to compel. The US Court of Appeals for the Second Circuit held that granting the motion to compel did not violate the FSIA. The Supreme Court affirmed, ruling that the FSIA does not immunise a foreign-sovereign judgment debtor from post-judgment discovery of information concerning extraterritorial assets. The Supreme Court reasoned that the FSIA has no 'provision forbidding or limiting discovery in aid of execution of a foreign sovereign judgment debtor's assets'.[82]

In a lone dissent, Justice Ginsburg argued that the majority's decision was overbroad, essentially authorising US courts to become clearing houses for information about any and all property held by a foreign sovereign abroad.[83] The dissent would draw the line of proper discovery at the foreign sovereign's property used for commercial activities in the United States or abroad. Notably, however, even the dissent's formulation of the rule would empower a US court to authorise worldwide asset discovery.

At a minimum, the decision clears the path for creditors to seek asset discovery for purposes of collecting on debts owed by foreign sovereigns. But the Court's reasoning may have a broader impact on the interpretation of the FSIA. The Court held that the FSIA 'comprehensive[ly]' sets out the scope of foreign sovereign immunity and that 'any sort of immunity defence made by a foreign sovereign in an American court must stand on the Act's text'.[84] Thus, the decision can be understood to reject implied extensions of immunity or interpretations of the FSIA that would expand immunity beyond the strict language of the text. For example, the Court rejected Argentina's effort to invoke a supposed pre-existing common-law immunity because it is 'obvious that the terms of §1609 execution immunity are narrower than the supposed [common-law execution-immunity] rule'.[85]

Also, on 16 June, the Court denied Argentina's petition for *certiorari* in a related case, *NML Capital Ltd v. Republic of Argentina*, where the lower courts had issued *pari passu* injunctions requiring Argentina to make rateable payments to holders of its defaulted bonds if it also made payments to holders of its restructured bonds. The denial of certiorari leaves in place the pro-judgment creditor decision of the Second Circuit Court of Appeals, which rejected the argument that the FSIA bars injunctive relief under these circumstances. The case arose out of an attempt by Argentina to pay only the bondholders who had agreed to the restructuring of their bonds, thereby ensuring that the bondholders who elected to sue Argentina would continue to receive no payment. The Second Circuit ruled that Argentina had violated a contractual promise to treat all bondholders equally and that injunctive relief was, therefore, appropriately granted by the district court.

82 Slip Op. at 8.

83 Ibid. at 1 (Ginsburg, J, dissenting).

84 Ibid. at 6-7.

85 Ibid. at 9.

Appendix 1

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